OPINION NO. 89-088

Syllabus:

1. An employee of a board of elections who worked on an intermittent basis between 1964 and 1969 was entitled to accrue sick leave benefits pursuant to R.C. 143.29 as then in effect.

2. If an employee of a board of elections who now serves on a full-time permanent basis was not properly granted sick leave for work performed on an intermittent basis between 1964 and 1969, the board of elections may correct its records to reflect the full amount of sick leave benefits to which the employee was entitled.

3. An employee of a board of elections who worked for 858 hours on an intermittent basis between 1964 and 1969 was not entitled to accrue vacation leave benefits during that period.

4. For purposes of calculating vacation leave benefits under R.C. 325.19, an employee is entitled to service credit for each biweekly pay period during which the employee worked, even though the work was performed on an intermittent basis.

5. If an employee of a board of elections who now serves on a full-time permanent basis was not properly granted service credit for work performed on an intermittent basis between 1964 and 1969, the board of elections may correct its records to grant such credit and may compute the employee's vacation leave benefits on the basis of the corrected records; if the employee has not been credited with all vacation leave to which she was entitled, the board of elections may modify its records to reflect the appropriate accrual of vacation leave.

To: Robert P. DeSanto, Ashland County Prosecuting Attorney, Ashland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 3, 1989

I have before me your request for an opinion concerning sick leave benefits, vacation leave, and prior service credit for an individual who served as an intermittent employee of a board of elections. The facts that you have presented are these:

> [A]n employee worked a total of 858 hours for the board of elections between 1964 and 1969. The employee worked on an intermittent, "as needed" basis. The employee did not accrue either vacation or sick leave during this time period. In 1969, the employee became a full-time, permanent employee of the board of elections. The employee now claims approximately forty-nine (49) hours of accrued sick leave for the service between 1964 and 1969. Additionally, the employee is claiming prior service credit under ORC 9.44 and states that her anniversary date of employment changes from October 20, 1969, to May 5, 1969, due to prior service credit.

I assume that the employee in question continues to work for the board of elections as a full-time, permanent employee.

You have asked the following questions:

1. Is this employee entitled to accrued sick leave for the 858 hours worked between 1964 and 1969? If so, is that sick leave computed under the present sick leave statute or the version in effect between 1964 and 1969?

2. Is an employee who worked on an intermittent, "as needed" basis between 1964 and 1969 entitled to accrued vacation leave for that time period?

3. Is prior service credit awarded for time worked on an intermittent, as needed basis between 1964 and 1969? If so, how is the credit computed: one year of credit for each year of service or on an hour to hour basis?

I consider first the question of sick leave for an employee of a board of elections who worked on an intermittent basis between 1964 and 1969. In 1988 Op. Att'y Gen. No. 88-091, I determined, as a general matter, that board of elections employees are employees in the county service[1] who are entitled to receive sick leave benefits pursuant to R.C. 124.38. *Accord* 1981 Op. Att'y Gen. No. 81-015. R.C. 124.38 currently states, in part, that employees in the various offices of the

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[1] I am aware that there has been some controversy as to whether employees of a board of elections are state or county employees for purposes of such fringe benefits as sick leave and vacation. *See, e.g.*, 1986 Op. Att'y Gen. No. 86-077 (overruling 1965 Op. Att'y Gen. No. 65-193); 1981 Op. Att'y Gen. No. 81-015. That controversy is, however, irrelevant to a determination of sick leave benefits for the period 1964 through 1969, since statutory provisions establishing sick leave benefits for that period covered

county service are entitled "for each completed eighty hours of service to sick leave of four and six-tenths hours with pay," and also states that unused sick leave is cumulative without limit. The employee in question is, accordingly, currently entitled to accrue sick leave at the specified rate, and to accumulate it without limit.

Your question pertains to the accrual of sick leave for 858 hours worked on an intermittent basis between 1964 and 1969. You have stated that no sick leave was accrued at the time, and I am assuming that neither the county nor the board of elections had in effect during that period any policies that modified the statutory sick leave provisions. *See generally* R.C. 124.39; *Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984); Op. No. 88-091; 1986 Op. Att'y Gen. No. 86-077; 1984 Op. Att'y Gen. No. 84-091; Op. No. 81-015; 1969 Op. Att'y Gen. No. 69-077. I note that employees of county boards of elections are exempt from the collective bargaining provisions of R.C. Chapter 4117, *see* R.C. 4117.01(C)(12), so that there is no need to consider whether provisions of a collective bargaining agreement modify the employee's sick leave benefits. *See generally* R.C. Chapter 4117; 1985 Op. Att'y Gen. No. 85-102 at 2-435 to 2-436 n. 1. To determine whether the employee in question was entitled to accrue any sick leave between 1964 and 1969, it is necessary to examine the statutes that were then in effect.

Prior to May 17, 1967, full-time employees in the county service were entitled, for each completed month of service, to sick leave of one and one-fourth work days with pay. They were permitted to accumulate only ninety work days of sick leave, unless more days were approved by the responsible administrative officer of the employing unit. R.C. 143.29, the predecessor to R.C. 124.38, stated expressly: "Provisional appointees or those who render part-time, seasonal, intermittent, per diem, or hourly service shall be entitled to sick leave for the time actually worked at the same rate as that granted full-time employees." 1965 Ohio Laws 129 (Am. H.B. 937, eff. July 22, 1965). *See also* 1949-1950 Ohio Laws 658 (Am. H.B. 109, passed July 11, 1949) (amending G.C. 486-17c, predecessor to R.C. 143.29). An employee of a board of elections who worked on an intermittent basis between 1964 and May 17, 1967 was, thus, entitled to accrue sick leave according to these statutory provisions. *See* 1957 Op. Att'y Gen. No. 604, p. 180 at 182-83 (discussing calculation of sick leave benefits of part-time, seasonal, intermittent, per diem, or hourly employees). *See generally* 1967 Op. Att'y Gen. No. 67-003.

In 1967, R.C. 143.29 was amended to adopt the same entitlement ratio currently in effect: sick leave of four and six-tenths hours for each completed eighty hours of service. 1967-1968 Ohio Laws, Part I, 164 (Am. Sub. H.B. 93, eff. May 17, 1967). That amendment dropped the language pertaining directly to provisional appointees and those who render part-time, seasonal, intermittent, per diem, or hourly service, apparently on the basis that, regardless of the schedule on which work is performed, each employee is entitled to the specified amount of sick leave for each eighty hours of work completed.[2] The amendment "altered the basis upon which sick leave would be computed, so that leave would accrue on the basis of each eighty hours of service rather than on the basis of monthly employment. However,

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both state and county employees. *See, e.g.*, 1969-1970 Ohio Laws, Book I, 864 (Am. Sub. S.B. 297, eff. Aug. 18, 1969) (setting forth provisions of R.C. 143.29 establishing sick leave entitlement for "[e]ach employee, whose salary or wage is paid in whole or in part by the state, and each employee in the various offices of the county service..."); 1949-1950 Ohio Laws 658 (Am. H.B. 109, passed July 11, 1949).

[2] The following language currently appears in 1 Ohio Admin. Code 123:1-32-03(A): "All employees in the various offices of the counties..., including part-time, seasonal, and intermittent, shall earn sick leave credit at the rate of four and six-tenths hours for each eighty hours of completed service unless the county agency has adopted policies for accumulation of sick leave in accordance with the provisions of [R.C. 124.39]." *See also* 1988 Op. Att'y Gen. No. 88-091 (syllabus) ("[f]ull-time employees of a board of elections who are employed on a seasonal, temporary, or intermittent basis are entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38").

no intent to alter the sick leave available to full-time employees was evident." 1977 Op. Att'y Gen. No. 77-029 at 2-107. In 1969, R.C. 143.29 was amended to permit the accumulation of one hundred twenty work days, unless more were approved by the responsible administrative officer of the employing unit. 1969-1970 Ohio Laws, Book I, 864 (Am. Sub. S.B. 297, eff. Aug. 18, 1969). *See generally* 1970 Op. Att'y Gen. No. 70-021. An employee of a board of elections who worked on an intermittent basis between May 17, 1967 and 1969 was, thus, entitled to accrue and accumulate sick leave according to these statutory provisions.

On the facts that you have presented, it is clear that the employee in question was entitled, during the period 1964 to 1969, to accrue sick leave benefits in accordance with the statutes that were then in effect. The board of elections has authority to appoint its employees, fix their compensation, and provide fringe benefits. *See* R.C. 3501.14; Op. No. 88-091; Op. No. 84-091. The board of county commissioners has limited authority with respect to employees of the board of elections. *See* Op. No. 84-091. County moneys are used to pay compensation to board of elections employees and other expenses of the board, in the same manner as other county expenses are paid. *See* R.C. 3501.17; Op. No. 84-091. I have concluded, generally, that a county appointing authority has the obligation to keep records of the compensation and fringe benefits granted to its employees and the corresponding authority to modify such records when appropriate. *See* 1987 Op. Att'y Gen. No. 87-076. *See generally* 1982 Op. Att'y Gen. No. 82-073 (discussing state employees). A board of elections may, accordingly, make appropriate modifications to records of sick leave granted to its employees. In particular, if it is determined, as a factual matter, that the employee in question was entitled to accrue sick leave for work performed between 1964 and 1969 and was not granted that sick leave, the board of elections may modify its records so that they reflect the accrual of the sick leave to which the employee was entitled. *See* Op. No. 87-067. To make such a determination, it will be necessary to look at the schedule on which the hours were worked, applying the appropriate provisions to hours worked prior to May 17, 1967, and those worked after May 17, 1967.

As noted above, the provisions governing the accrual of sick leave have changed during the period in question. Those provisions are, however, premised on the assumption that sick leave is accrued as provided by statute. Since the employee in question was not credited with sick leave at the appropriate time, she had no opportunity to use it at that time, and it would be inappropriate to use the limitations on the accumulation of sick leave as a means of restricting her right to such leave. *See* Op. No. 82-073 at 2-205 n. 1 (considering the granting of vacation leave to state employees who had, through error, not been granted the full amount of vacation to which they were entitled, and concluding that the statutory limitation on the carry-over of accumulated vacation benefits did not restrict the employees' right to the additional leave).

I turn now to your questions pertaining to vacation leave. You have asked whether the employee in question, who worked on an intermittent basis between 1964 and 1969, is entitled to accrued vacation leave for that period. I have determined that, under existing law, employees of a board of elections are in the county service and are entitled to vacation leave pursuant to R.C. 325.19. *See* Op. No. 86-077. R.C. 325.19(A) provides varying amounts of vacation leave for full-time employees, depending upon their years of service with the county or another political subdivision of the state. *See* R.C. 9.44; 1988 Op. Att'y Gen. No. 88-089. R.C. 325.19(B) authorizes a board of county commissioners to grant paid vacation leave to part-time county employees.

To determine whether the employee in question was entitled to the accrual of vacation leave for work performed between 1964 and 1969, it is necessary to look at the statutes that were in effect during that period. I am assuming that neither the county nor the board of elections had in effect any policies that modified the statutory vacation entitlement provisions. *See generally* R.C. 325.19; *Cataland v. Cahill*; Op. No. 88-091; Op. No. 86-077; Op. No. 81-015. As discussed above, employees of county boards of elections are exempt from public employees' collective bargaining provisions, *see* R.C. 4117.01(C)(12); so there is no need to consider whether a collective bargaining agreement modifies an employee's vacation leave benefits. *See generally* R.C. Chapter 4117; Op. No. 85-102 at 2-435 to 2-436 n. 1.

During the period in question, R.C. 325.19 provided that each full-time employee in the county service was, after service of one year, entitled to two calendar weeks of vacation with pay; employees with longer service were entitled to more vacation. *See, e.g.*, 1969-1970 Ohio Laws, Book III, 2968 (Am. H.B. 1140, eff. May 26, 1970); 1959 Ohio Laws 627 (Am. Sub. H.B. 208, eff. Nov. 4, 1959).[3] It does not appear that an intermittent employee whose work totaled 858 hours between 1964 and 1969 was entitled to vacation leave pursuant to those provisions. The term "full-time employee," in its ordinary construction, refers to an employee who works on a regular, full-time schedule, and does not include an employee who serves only as needed. *See Webster's New World Dictionary* 564 (2d college ed. 1978) (defining "full-time" as "engaged in work...for specified periods regarded as taking all of one's regular working hours"). It appears that this ordinary meaning is the construction that has been given to the term "full-time employee" in connection with the provision of vacation benefits for county employees. *See* 1962 Op. Att'y Gen. No. 3464, p. 971 (syllabus, paragraph 2) ("[t]here is no statutory designation of what constitutes full-time employment for county employees within the purview of Section 325.19, Revised Code, and, in the absence of such designation, a full-time employee is a person who regularly works all of the working hours required by the employer as normal working hours for his employees").[4] *Compare* R.C. 325.19 *with* 1949-1950 Ohio Laws 658 (Am. H.B. 109, passed July 11, 1949) (containing provisions governing sick leave for county employees and granting accrual rights to persons who render part-time, seasonal, intermittent, per diem, or hourly service). *See generally* 1982 Op. Att'y Gen. No. 82-064. Thus, the employee in question was not, between 1964 and 1969, entitled to vacation leave as a county employee.

It should be noted that, during the period in question, one of my predecessors concluded, in 1965 Op. Att'y Gen. No. 65-193, that employees of a county board of elections were state employees whose vacation rights were governed by R.C. 121.161 (now R.C. 124.13-.134). While I disagree with that conclusion and overruled it in Op. No. 86-077, I am aware that, prior to the issuance of Op. No. 86-077, a board of elections might, in reliance upon Op. No. 65-193, have granted its employees vacation benefits pursuant to R.C. 121.161 rather than R.C. 325.19. *But see* Op. No. 81-015 (concluding that employees of a board of elections were county employees for purposes of sick leave provisions and casting doubt upon the

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3 Prior to the enactment of 1959 Ohio Laws 627 (Am. Sub. H.B. 208, eff. Nov. 4, 1959), the statutory provisions governing vacation for county employees granted vacation leave to county employees working on a per diem basis or an hourly basis. *See, e.g.*, 1955-1956 Ohio Laws 416 (Am. H.B. 27, eff. Sept. 23, 1955). Those provisions were construed as applying to "part time" or "incidental" employees. *See* 1949 Op. Att'y Gen. No. 594, p. 294. Such provisions were, however, not in effect during the period 1964 through 1969.

4 The following definitions currently appear in R.C. 325.19:

> (I) As used in this section:
> (1) "Full-time employee" means an employee whose regular hours of service for a county total forty hours per week, or who renders any other standard of service accepted as full-time by an office, department, or agency of county service.
> (2) "Part-time employee" means an employee whose regular hours of service for a county total less than forty hours per week, or who renders any other standard of service accepted as part-time by an office, department, or agency of county service, and whose hours of county service total at least five hundred twenty hours annually.

These definitions were initially enacted in 1979-1980 Ohio Laws, Part I, 2542-45 (Am. H.B. 333, eff. May 13, 1980) as part of legislation authorizing the board of county commissioners to grant vacation leave to part-time employees. These definitions are consistent with the conclusion that an intermittent employee is not a full-time employee.

continuing validity of Op. No. 65-193). During the period 1964 through 1969, R.C. 121.161, like R.C. 325.19, provided that only full-time employees were entitled to vacation leave and that entitlement did not occur until service of one year was completed. *See, e.g.*, 1959 Ohio Laws 627 (Am. Sub. H.B. 208, eff. Nov. 4, 1959). Thus, an employee who worked on an intermittent basis for a total of 858 hours in the period between 1964 and 1969 would not have been entitled to any vacation leave if considered to be a state employee.

In connection with your second question, I conclude that an employee of a board of elections who worked on an intermittent basis between 1964 and 1969, for a total of 858 hours of work, was not entitled to accrue vacation leave during that time. The fact that an employee was not entitled to accrue vacation leave during a particular period does not, however, mean that work performed during that period may not be counted as service credit if the employee subsequently holds employment which provides an entitlement to vacation benefits. In 1988 Op. Att'y Gen. No. 88-095, I concluded that, for purposes of computing vacation benefits under R.C. 325.19(A), a full-time county employee is entitled to prior service credit for service performed on a part-time basis. The syllabus of 1966 Op. Att'y Gen. No. 66-120 expressly states that, in determining the amount of service credit for vacation purposes, "credit should be given for periods of service which were part-time, and credit should be given for periods of service which were full-time but were seasonal or irregular during the course of the year." *See also* 1987 Op. Att'y Gen. No. 87-055; Op. No. 66-120 at 2-225 ("[i]f the Legislature had intended to limit the accrual of vacation benefits to periods of full-time service, they could easily have done so by inserting the word 'full-time' in front of the word 'service'"). I conclude, accordingly, that the work performed by the employee in question on an intermittent basis was service to the county that may be counted as county service pursuant to R.C. 325.19. R.C. 325.19 specifies that one year of service shall be computed on the basis of twenty-six biweekly pay periods. This provision has been construed as meaning that an employee is entitled to service credit for each biweekly pay period in which the employee actually worked or was scheduled to work. Op. No. 88-095; Op. No. 87-055; 1982 Op. Att'y Gen. No. 82-055. The employee in question is, therefore, entitled to service credit for each biweekly pay period during which she actually worked.

Your letter speaks of changing the employee's anniversary date of employment. I note that, although the term "anniversary date" appears in R.C. 9.44,[5] that concept is not relevant to a determination of the amount of vacation leave to which an employee is entitled under R.C. 325.19. *See* Op. No. 88-089. "Rather, an employee's anniversary date of employment is used as a limitation upon the time within which he may use his annual vacation benefits or as the date from which to measure the amount of unused vacation leave for which he may receive compensation. R.C. 325.19(C)." Op. No. 88-089 at 2-426 to -427. *See* 1989 Op. Att'y Gen. No. 89-012.

The employee in question is entitled to have her vacation leave calculated pursuant to R.C. 325.19 on the basis of years of service credit including the service credit to which she is entitled for the period between 1964 and 1969. As discussed above, the board of elections, as appointing authority, must keep records of the compensation and fringe benefits granted to its employees and may modify such records as appropriate. *See* R.C. 3501.14; Op. No. 87-076; Op. No. 82-073. If the records of the board of elections do not reflect the appropriate amount of service credit for a particular employee, the board may correct its records to grant such credit and may compute the employee's vacation leave benefits on the basis of the corrected records. *See* Op. No. 87-067. As discussed in connection with sick leave, it would be inappropriate to construe restrictions upon the carry-over of accumulated vacation benefits to limit the employee's right to any leave to which

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5 R.C. 9.44 provides for instances in which an employee of a particular public employer may have prior service with a different public employer counted as service for purposes of computing vacation leave benefits. In the instant case, all employment has been with a single employer and there is no question about receiving service credit for service with a different employer.

she was entitled. *See* R.C. 325.19(C); Op. No. 87-067; Op. No. 82-073 at 2-205 n. 1. *See generally State ex rel. Bossa v. Giles*, 64 Ohio St. 2d 273, 415 N.E.2d 256 (1980).

It is, therefore, my opinion, and you are hereby advised, as follows:

1. An employee of a board of elections who worked on an intermittent basis between 1964 and 1969 was entitled to accrue sick leave benefits pursuant to R.C. 143.29 as then in effect.

2. If an employee of a board of elections who now serves on a full-time permanent basis was not properly granted sick leave for work performed on an intermittent basis between 1964 and 1969, the board of elections may correct its records to reflect the full amount of sick leave benefits to which the employee was entitled.

3. An employee of a board of elections who worked for 858 hours on an intermittent basis between 1964 and 1969 was not entitled to accrue vacation leave benefits during that period.

4. For purposes of calculating vacation leave benefits under R.C. 325.19, an employee is entitled to service credit for each biweekly pay period during which the employee worked, even though the work was performed on an intermittent basis.

5. If an employee of a board of elections who now serves on a full-time permanent basis was not properly granted service credit for work performed on an intermittent basis between 1964 and 1969, the board of elections may correct its records to grant such credit and may compute the employee's vacation leave benefits on the basis of the corrected records; if the employee has not been credited with all vacation leave to which she was entitled, the board of elections may modify its records to reflect the appropriate accrual of vacation leave.